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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.....

JAMES D. LEE, RALPH M. WEST, C. L. LILLARD, FRED ROSE, JOHN E. OSBORNE, PAUL W. SHERLIN, ROSS L. BUCKLEY, MICHAEL W. DAVIS, ROBERT P. ROSE, CLARENCE S. HOLLAND, HUGHIE E. REEVES, LABAN DeFRIESE, O. M. MULLINS, MARTHA ANN DAWSON MADDOX, ROY L. LUMPKIN, JR., PAUL O. WIRZ, JOHN O'KEEFE, JAMES A. BOULDIN, MRS. JACK PRATT, JR., CLYDE O. COOPER, JACK H. PRATT, III, HAROLD R. COCKRELL, MARCUS L. MOORE, GEORGE BUSSING, ROBERT D. KING, HERMAN HEINEMANN, J. H. PAYNE and CLAUDE A. FINLEY,

Petitioners,

versus

THE CITY OF CHATTANOOGA, a municipality within the State of Tennessee; and MAYOR ROBERT KIRK WALKER, COMMISSIONER JOHN FRANKLIN, COMMISSIONER STEVE CONRAD, COMMISSIONER PAT ROSE, and COMMISSIONER EUGENE ROBERTS, in their capacity as Board of Commissioners of Chattanooga, Tennessee,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION

The Petitioners, James D. Lee, et al., pray that the Writ of Certiorari issue to review the opinion of the Court of Appeals of Tennessee, Eastern Section, rendered in these proceedings on July 24, 1973, and the

Judgment entered July 26, 1973, nunc pro tunc for July 24, 1973.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW.

This case originated in the Chancery Court of Hamilton County, Tennessee. The Honorable Chancellor Ray L. Brock, Jr. rendered a decision in favor of petitioners against respondents. A copy of the Court's Memorandum Opinions filed April 9, 1973, and May 10, 1973, respectively, appear in the Appendix, pp. 54-75. The case was appealed to the Court of Appeals of Tennessee, Eastern Section, at Knoxville, Tennessee. That Court rendered a judgment in favor of respondents. This opinion appears in the Appendix, pp. 76-87 and the Judgment appears in the Appendix, pp. 87-89.

Petitioners timely filed a Petition for Writ of Certiorari and Supersedeas to the Tennessee Supreme Court under the authority of Tennessee Code Annotated Sec. 27-819 and Rule 11 of the Rules of the Tennessee Supreme Court. Said Petition was denied on Novem-

ber 5, 1973. Copy of the Notice of Denial appears at Appendix, p. 89. A Petition to Rehear was timely filed under the authority of Tennessee Code Annotated Sec. 16-112 and Rule 32 of the Rules of the Tennessee Supreme Court. Said Petition was denied by the Tennessee Supreme Court on January 7, 1974. Copy of the Notice of Denial appears at Appendix, p. 89. A second Petition to Rehear was timely filed under the authority of Tennessee Code Annotated Sec. 16-112 and Rule 32, supra, and it was denied by the Tennessee Supreme Court on May 6, 1974. Copy of the Notice of Denial appears at Appendix, p. 91. The practice in Tennessee is that when a Petition for Writ of Certiorari is denied by the Supreme Court, the Court merely informs the parties by post card that a petition is denied. Thus, insofar as the Tennessee Supreme Court is concerned, there are no written opinions from that Court. The Statutes and Rules are in the Appendix, pp. 40-53.

GROUNDS ON WHICH JURISIDCTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked on the ground that the final decision denying petitioners' second Petition to Rehear in the Tennessee Supreme Court was dated May 6, 1974, and was filed on that date. This Petition for Writ of Certiorari was filed within ninety (90) days of said date. The statutory provision granting this Court jurisdiction to review the decision of the Court of Appeals of Tennessee is 28 U.S.C.A., Sec. 1257(3).

A judgment of a state court becomes final for purposes of review in the U.S. Supreme Court by Writ of Error or Certiorari in a case in which a petition for rehearing is entertained, upon the date of the denial or other disposition of such petition. Citizens' Bank v. Opperman, (Ind. 1919) 39 S.Ct. 330, 249 U.S. 448, 63 L.Ed. 701.

This proceeding arose in the Chancery Court of Hamilton County, Tennessee, wherein the petitioners contended that the attempted annexation by The City

of Chattanooga of the areas involved in this litigation should be declared a nullity and void on the ground that the annexation was attempted in a manner not only not authorized by state statute, but in contravention of the very state statutes that the respondents contend they annexed under. In addition, and of utmost importance in this petition, petitioners state that their constitutional rights, both Federal and State, were violated.

The Trial Court held that the attempted annexation was void because "judicial legislation" was substituted for the enactment of annexation ordinances as required T.C.A. Sec. 6-303 et seq. The attempt was void as constituting a violation of the doctrine of separation of powers and a denial of due process and equal protection of the laws under both the constitutions of the United States and the State of Tennessee.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Court of Appeals, in its opinion, did not consider the Trial Court's holding that "judicial legislation" was involved. The constitutional question was ignored by both the Court of Appeals and the Supreme Court of the State of Tennessee.

The provisions of the United States and Tennessee constitutions forbidding legislation by judicial departments are Section 1 of Article 1 of the United States Constitution which provides:

> "Legislative Powers Vested in Congress. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'

and Sections 1 and 2 of Article 2 of the constitution of Tennessee which provide:

> "Sec. 1. Division of Powers.. The powers of the government shall be divided into three distinct departments: the legislative, executive, and judicial.
>
> "Sec. 2. Limitation of Powers.. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either

> of the others, except in the cases herein directed or permitted."

Amendment XIV, Section 1 of the United States constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor to deny any person within its jurisdiction his equal protection of the laws."

It is a basic legal principle that one cannot be deprived of his property by state action without due process of law. Wojnicz vs. Michigan Dept. of Corrections, (1971) 188 N.W.2d 251, 32 Mich, App. 121.

Due process of law is secured against state action by this clause. State vs. Percy, (1958) S.E. 2d 404, 248 N.C. 334.

A judicial decree which violates vested rights is within the prohibition of the due process clause.

Lander vs. Siegel, (1930) 148 A. 699, 298 Pa. 487; Nesbit vs. Rieseman, (1930) 148 A. 695, 298 Pa. 475, cert. denied 50 S.Ct. 480, 281 U.S. 754, 74 L.Ed. 1164.

The Federal guarantee of due process extends to state action through judicial as well as legislative, the executive or the administrative branch of government. Brinkerhoff-Faris Trust & Savings Co. vs. Hill, (1930) 50 S.Ct. 541, 281 U.S. 673, 74 L.Ed. 1107.

Citizens may not be deprived of property without due process of law. Williams vs. White Plains Housing Authority, (1970) 309 N.Y.S.2d 454, 622 Misc. 2d 613. The word "property" as used in this amendment includes every interest anyone may have in any and everything that is subject to ownership by man, together with the right freely to possess, enjoy or dispose of same, and the right of user cannot be wholly taken away or limited by the state except insofar as it may become necessary for individual rights to yield to the best interest of the people.

Father Bisil's Lodge vs. City of Chicago, (1946) 65 N.E.2d 805, 393 Ill. 246.

Each department of the state government is limited within its appropriate sphere. The people have delegated to each department as their agent such portion of their inherent sovereignty as was deemed expedient. One department cannot assume the exercise of any of the powers conferred upon the other departments; nor can one department by transfer to another department, divest itself of any portion of the power expressly confided to its own exercise, except in virtue of an explicit authority to that effect, given by the constitution itself. Kilbourne vs. Thompson, (1881) 103 U.S. 168, 26 L.Ed. 377.

The courts are expressly forbidden by the constitution of the State of Tennessee to exercise any of the powers properly belonging to the legislative department. Ballentine vs. Pulaski, (1885) 83 Tenn. 633.

No judgment of a court is due process of law if rendered without jurisdiction in the court. Scott vs. McNeal, 154 U.S. 34, 14 S.Ct, 1108, 38 L.Ed. 896,

Old Wayne Mut. Life Asso. vs. McDonough, 208 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 346; Twining vs. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97.

The principle is well established that the courts will not assume jurisdiction in any case which will amount to an interference by the judicial department with the legislature, since each department is equally independent within the powers conferred upon it by the constitution. The courts have no power to interfere with, or control the exercise on the part of the legislature of, the power belonging exclusively to that department. The judiciary, furthermore, cannot interfere with the legislative process of enacting the laws. 16 Am. Jur. 2d, Constitutional Law, Sec. 226 p. 474; Collins vs. Hardyman, 341 U.S. 651, 95 L.Ed. 1253, 71 S.Ct. 937; Old Dearborn Distributing Co. vs. Seagrams Distillers Corp., 299 U.S. 183, 81 L.Ed. 109, 57 S.Ct. 193; Marshall vs. Gordon, 243 U.S. 521, 61 L.Ed. 881, 37 S.Ct. 448.

THE QUESTIONS PRESENTED FOR REVIEW.

(1) Were petitioners' constitutional rights violated under Amendment XIV, Section 1 and Section 1, Article 1 of the United States constitution and Sections 1 and 2, Article 1 of the constitution of the State of Tennessee?

(2) Was the attempted annexation based upon "judicial legislation" rather than the provisions of the Tennessee statutes appearing at T.C.A. Sec. 6-309, et seq?

(3) Were the territories in question properly annexed under the provisions of T.C.A. Sec. 6-309, et seq?

STATUTES INVOLVED IN THE CASE.

There are included in the Appendix hereto, pp. 40-50, the test of the statutes of the State of Tennessee involved in this case, to-wit: T.C.A. Sec. 6-303, 6-309, 6-310, 6-311, 6-313, and 27-819.

STATEMENT OF THE CASE.

References hereinafter made are to the pages of the printed record before the Court of Appeals of Tennessee.

Petitioners contend that the attempted annexation by the respondent, City of Chattanooga, Tennessee, of the areas involved in this litigation should be declared a nullity and void on the grounds that the annexation was attempted in a manner not only not authorized by state statute, but in contravention of the very state statutes that the City contends that it annexed under. Further, petitioners contend that their constitutional rights were violated in that annexation was attempted by "judicial legislation."

Respondents' position is that annexation was attempted under the statutory authority of T.C.A Sec. 6-309, et seq., whereas, petitioners state that the City did not act pursuant to ordinances but pursuant to "compromise consent orders" entered in quo warranto suits pending in the Hamilton County

Circuit Court; that these orders are void on their face and the City's actions were without statutory authority, without jurisdiction of the subject matter, and a nullity-void ab initio, and that therefore, the areas in question have never been annexed. (Tr. Vol. 1, pp. 60 through 78.)

The Chancellor sustained petitioners' contentions and agreed that the areas have never been annexed (See Appendix, pp. 54-75.)

Respondents appealed to the Court of Appeals of the State of Tennessee and filed their assignments of error as required by the rules of that Court. The Court of Appeals made no finding with respect to any particular error assigned by the respondents nor did the Court refer, in its opinion, to any particular assignment; however, it said:

> "It results that the assignments of the City of Chattanooga must be sustained. . . ." (See Appendix; pp. 76-86.)

After the decision of the Court of Appeals, petitioners filed a Petition for Writ of Certiorari and

Supersedeas to the Tennessee Supreme Court. Their Petition to Rehear was filed and denied on January 7, 1974. A second Petition to Rehear was filed and denied on May 6, 1974.

FACTS RELEVANT TO THE ISSUES.

The facts relevant to the issues on the merits of this case are as follows:

1. On November 12, 1968, the City adopted a plan of services for annexation of each of the three areas here involved as required by T.C.A. Sec. 6-309. This plan of services consisted of five and one-half pages of detailed and specific plans for the provision of police protection, fire protection, water for domestic, commercial and industrial use, the installation of fire hydrants, the installation of sewers and a complete sewer system and refuse collection, the maintenance and reconstruction of streets in the areas, the taking over and governing of schools within the areas, the installation of inspection services such as building, electrical, plumbing, gas, housing,

weights and measures, etc., the imposing of planning and zoning regulations of the City of Chattanooga, the installation and maintenance of a comprehensive street lighting system, the provision for recreational facilities, and, finally, the installation of street names. This plan of services also provided a detailed timetable to be followed whereby each of the above enumerated services was to be completed. The plan of services was set out in resolutions of the City of Chattanooga, which were made exhibits at the trial. (Tr. Vol. 6, Ex. 1.)

2. On November 26, 1968, the respondent, City of Chattanooga, adopted annexation ordinances covering the areas in question, pursuant to the Tennessee Public Acts of 1955 which authorized annexation by ordinances. The ordinances are exhibits in the record. (Tr. Vol. 6, Exs. 2, 3 and 4.)

3. The 1968 ordinances were immediately met in December, 1968, with quo warranto suits filed by aggrieved property owners of the areas in ques-

tion, pursuant to the provisions of T.C.A Sec. 6-310. (Tr. Vol. 6, Exs. 8, 9 and 10.)

4. The quo warranto suits were allowed to lie dormant from December, 1968 until August, 1971, a period of some thirty-two (32) months duration. This was due in part to (a) a realization of the City that it could not comply with the plan of services which it had approved; (b) efforts on the part of the City to procure the passing of a new state law authorizing a new method of annexation which culminated in the enactment of Chapter 420 of the Public Acts of 1971 as an amendment to T.C.A. Sec. 6-309; (c) negotiations concerning proposals by the City to settle the suits; and (d) efforts to consolidate the governments by metro.

5. Following the adoption of Chapter 420 of the 1971 Public Acts, the Board of five Commissioners of the City adopted a resolution by a vote of three to two to enter into compromise decrees of the pending quo warranto actions above mentioned whereby the City "cast aisde," abandoned or repealed its pre-

viously adopted ordinances and proceeded to annex the areas in question under the new method of annexation, a new plan of services and a new timetable, as authorized by the 1971 Act. (Tr. Vol. 1, p. 164; Vol. 6, Ex. 14.)

6. The new method of annexation consisted of a new abbreviated plan of services, consisting of slightly more than one-half page, a new timetable for putting these new services into effect and a drastically reduced plan of taxation - the amount of tax being based upon the extent of services rendered as provided by Chapter 420 of the Public Acts of 1971 - all entirely new, different and incompatible with the 1968 ordinances.

7. Having reached the above mentioned agreement with attorneys for the complainants in the quo warranto actions, so called "final orders" were entered in each of the actions in the Circuit Court. Copies of these "final orders" are included in the transcripts and evidence. Each of the orders was

entered on August 18, 1971. (Tr. Vol. 6, Exs. 8, 9 and 10.)

8. The quo warranto suits never went to trial and no consideration was given to whether the ordinances were reasonable or unreasonable; no order was ever entered holding the ordinances either reasonable or unreasonable; no order was entered sustaining the validity whereby they could become operative; the final orders or consent decrees ordered the new method of annexation. (Tr. Vol. 6, Exs. 8, 9 and 10.)

9. The respondent, City of Chattanooga, then proceeded to attempt to annex these areas pursuant to the "final orders" and the action taken by the three to two vote approving the same hereinabove mentioned, until Chapter 420 of the Public Acts of 1971 was held to be unconstitutional by the Supreme Court of the State of Tennessee in Frost vs. City of Chattanooga, Tennessee, decided on December 18, 1972, cited at 488 S.W. 2d 370.

10. After the Frost decision was decided by the

Tennessee Supreme Court, petitioners filed this action on February 26, 1973, asserting that the attempted annexation under the 1971 Act was void ab initio and a nullity. (Tr. Vol. 1. pp. 6 through 25.)

11. From January 1, 1972 to January 1, 1973, respondent, City of Chattanooga, contended that it attempted to perform in accordance with the plan of services embodied in the final orders entered in the Circuit Court on August 18, 1971; however, after the decision in the Frost case, the City followed no plan but started to embark upon a course whereby it would render full and complete services as soon as reasonably possible on a level equivalent to the areas already within the City of Chattanooga, Tennessee. There was no plan of services to be followed.

ARGUMENT.

1. WERE PETITIONERS' CONSTITUTIONAL RIGHTS VIOLATED UNDER AMENDMENT XIV, SECTION 1 AND SECTION 1, ARTICLE 1 OF THE UNITED STATES CONSTITUTION AS WELL AS SECTION 1 AND 2, ARTICLE 2 OF THE CONSTITUTION OF THE STATE OF TENNESSEE?

2. DID ANNEXATION OCCUR BY "JUDICIAL LEGISLATION" RATHER THAN BY THE REQUIRED STATUTORY PROCEDURES SET FORTH IN T.C.A. SEC. 6-309, ET SEQ?

The exclusive method by which annexation can occur in Tennessee is governed by T.C.A. Sec. 6-303, et seq. Annexation of territories in Tennessee cannot occur through the judicial branch of our government. City of Johnson City vs. Maden, (1957) 202 Tenn. 307, 304 S.W.2d 317.

Petitioners have been denied due process of law in that annexation of the three areas in question was attempted by judicial legislation and not by the

legislative process as required by the Tennessee statutes. Petitioners were effectively denied due process in that their property was purportedly annexed through an agreed Circuit Court order. They were denied due process of law in that the City of Chattanooga attempted to annex the areas in question without following the mandates of the Tennessee statutes requiring notice of public hearings concerning annexation ordinances, timetable for plan of services, etc.

The separation of government powers into legislative, executive and judicial is provided for by constitutional provision and it is an established and fundamental principle that one department cannot interfere with, or encroach on, either of the other departments. If any department of government acts beyond the bounds of its authority, such action is without jurisdiction, unconstitutional and void. 16 C.J.S., Constitutional Law, Sec. 104, p. 485.

Legislative power is the power to enact laws or to declare what the law shall be. 16 C.J.S., supra, Sec. 106, p. 489.

Judicial power has been defined as the authority to hear and determine a controversy as to rights and, on such determination, to render a judgment binding on the litigants. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws already in existence. 16 C.J.S., supra, Sec. 144.

The judicial branch of government has no power or function to initiate or compel initiation of any governmental activity. 16 C.J.S., supra, Sec. 144; City of Wapakoneta vs Helpling, 19 N.E.2d 722, 135 Ohio St. 98.

In Tennessee, only the legislature can provide for annexation. The legislature has provided for annexation by ordinance. T.C.A. Sec. 6-309.

In the case at bar, the pivotal question is whether a city and court are empowered to annex by

judicial legislation (a court order), rather than by legislative action - ordinance.

In the Trial Court, the Chancellor stated that annexation can occur only by legislative action and ruled that: (1) The 1968 ordinances and plan of services for the areas in question were abandoned; (2) the attempt to annex these areas pursuant to Chapter 420 of the Public Acts of 1971 was ineffective for the reasons that (a) Chapter 420 of the Public Acts of 1971 was unconstitutional and (b) no ordinances were ever adopted purporting to annex these territories under Chapter 420; and (c) neither the Circuit Court nor the City by agreement with certain residents had power to annex.

The Court of Appeals did not meet the crucial issue of whether annexation can occur by a Court decree, i.e. judicial legislation. The Tennessee Supreme Court, by its denial of petitioners' Petition For Writ of Certiorari and Petitions to Rehear likewise did not meet the crucial issue of the constitutional

questions of "judicial legislation." Petitioners thus submit that their constitutional rights have been violated by the Appellate Court's failing to find that annexation occurred by judicial legislation.

Petitioners submit that the Trial Court was correct in holding that the attempted annexation was void because judicial legislation was substituted for the enactment of annexation ordinances as required by T.C.A. Sec. 6-303 et seq. The attempt was void as constituting a violation of the doctrine of separation of powers and a denial of due process and equal protection of the laws under both the constitutions of the United States and the State of Tennessee.

The provisions of the United States and Tennessee constitutions forbidding legislation by the judicial department are Section 1 of Article 1 of the United States constitution which provides:

> "Legislative Powers Vested in Congress. All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

and Sections 1 and 2 of Article 2 of the constitution of Tennessee which provides:

> "Sec. 1. Division of Powers.. The powers of the government shall be divided into three distinct departments: legislative, executive and judicial.
>
> "Sec. 2. Limitation of Powers. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

"Separation of powers" is a fundamental concept in our constitutional form of government. From the time of the establishment of the constitution, it has been recognized that one of the three departments of the government will not be allowed to encroach upon either of the others. The judicial branch will not be allowed to encroach upon the legislative branch. The legislation attempted by the courts is in violation of the doctrine of separation of powers; therefore, unconstitutional and void.

Judicial legislation is the unconstitutional process whereby annexation was attempted in this case.

This occurred in 1971 when the City "cast aside" or abandoned its 1968 ordinances and substituted consent decrees for new annexation ordinances. The decrees contained some provisions one might expect to find in duly enacted ordinances; however, the legislative process was not followed and the effect obviously resulted in a violation of the residents' constitutional rights. The Circuit Court consent decrees substituted for new annexation ordinances were entirely different from the old 1968 ordinances. They included a new plan of services, a new timetable for putting these services into effect and a new method of taxation (which the Tennessee Supreme Court called a new method of annexation in Frost, et al. vs. City of Chattanooga, 488 S.W.2d 370.)

The consent decrees were authorized and approved as a substitute for new ordinances by the five City Commissioners by a three to two vote at a meeting attended by all of the Commissioners and the City Attorney. The established procedures for enacting

an ordinance were not followed. The ordinances were contemplated but not passed. The consent decrees denied to the approximately 20,000 residents involved the opportunity to assert their statutory rights as far as a public hearing being conducted, etc. This was a denial both of due process and of equal protection under the laws - clearly unconstitutional.

The enactment of new ordinances would undoubtedly have opened the door to a flood of new quo warranto suits to test the reasonableness of the ordinances. Petitioners submit that the Respondent obviously did not want this to occur. Apparently, the Respondent recognized that the Tennessee statutes required an ordinance to annex. Thus, Respondent had to face the proposition of how annexation could be clothed with legality without ordinances. The idea was conceived to make the new substitute annexation plan a part of consent decrees in the quo warranto suits that had been pending for almost three years and

thereby prevent the residents from testing the new plan by quo warranto and put the entire matter to rest. Consent decrees were entered and the cases were dismissed. The Court never heard evidence nor made a finding with respect to the reasonableness of the ordinances - neither those passed in 1968 nor the new method of annexation adopted in 1971. Under these circumstances, the 1968 ordinances never became operative and no other ordinances were passed. Annexation was attempted by judicial legislation to avoid the effect of required legislation - ordinances.

A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than as provided for by legislative enactment or constitutional provisions. Such power may be validly delegated to a municipal corporation by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it. 37 Am. Jur. 341, Municipal Corporations, Sec. 24.

> "The annexation of territory to a municipal corporation is a legislative function which may not be delegated to a court or other body." 37 Am. Jur. 341, Municipal Corporations, Sec. 25. (Emphasis added.)

A court should never enter legislation by judicial decree. State, ex rel. Hyatt vs. Bomar, (1962) 210 Tenn. 249, 358 S.W.2d 295.

The Tennessee Supreme Court, in an annexation case, made the following statement concerning "judicial legislation":

> "We of the courts determine what are the corporate limits already established and we determine by our inquiry whether or not these boundaries as attempted to be established by the municipal power comply with the law. We have no authority to act for the municipal body." City of Johnson City vs. Maden, (1957) 202 Tenn. 307, 304 S.W.2d 317. (Emphasis added.)

The courts in Tennessee are expressly forbidden by the constitution itself to exercise any of the powers properly belonging to the legislative department. Ballentine vs. Pulaski, (1885) 83 Tenn. 633.

3. WERE THE TERRITORIES IN QUESTION PROPERLY ANNEXED UNDER THE PROVISIONS OF T.C.A. SEC. 6-309 ET SEQ?

This case does not involve issues of reducing or contracting boundaries. It is a case where the question is whether the particular areas in question ever legally became a part of the City of Chattanooga. One of pivotal issues in this case is whether the territories were annexed under T.C.A. Sec. 6-309, (that is, by ordinance) or whether they were attempted to be annexed by a method foreign to T.C.A. Sec. 6-309 et seq., that is, by "judicial legislation."

The Circuit Court in the quo warranto suits made no finding as to the validity of the ordinances. (Tr. Vol. 1, pp. 21, 22 and 23; Exs. 4, 5 and 6 to the Complaint.)

The filing of a quo warranto suit in Tennessee contests the validity of the annexation ordinances. T.C.A. Sec. 6-310. A quo warranto suit filed contesting an annexation ordinance puts into issue the

question of whether the proposed annexation ordinance is reasonable or unreasonable. The Court must enter an order either sustaining the validity of the ordinance or enter an order holding it unreasonable and invalid. T.C.A. Sec. 6-310.

The Trial Court did not hold the three ordinances void and unenforceable nor did it make any finding on the validity or invalidity of the ordinances.

Likewise, the Circuit Court, in the quo warranto suits, made no finding as to the validity or invalidity of the ordinances. The issue of validity of the 1968 ordinances was not resolved in this case. When quo warranto suits were filed contesting the annexation ordinances, this prevented the ordinances from becoming operative until after the suits had been properly disposed of. These suits were not concluded until 1971 and then in an improper, unconstitutional and illegal manner, by means which constituted judicial legislation - annexation by "compromise consent decree." The respondent, City of Chattanooga, attempted

to annex these areas - not by ordinances, as required by T.C.A. Sec. 6-309. Petitioners contend that the respondent, City of Chattanooga, abandoned the 1968 ordinances by voting upon and adopting a course of action contrary to the ordinances (Tr. Vol. 1, p.98). Respondent pursued a contrary course of action in adopting a new plan of services and timetable which were made a part of the Circuit Court final orders. (Tr. Vol. 1, Exs. 5, 6 and 7.) Respondent refused to enact new ordinances under the variable tax statute. (Tr. Vol. 5, pp. 459-460.)

The statute relied upon by respondent for its power to annex is T.C.A. Sec. 6-309. This statute empowers the City to annex by ordinance; that is, by legislation, following certain requirements. In the instant case, there are no ordinances.

The enactment of an ordinance involves the legislative process. Plumfield Nurseries, Inc. vs. Dodge County, 184 Neb. 346, 167 N.W.2d 560. A substantial compliance with all mandatory requirements

of the statutes is essential in an annexation proceeding. McQuillan Municipal Corp., Vol. 2, Sec. 729, pp. 419-420; Yokley Municipal Corp., Supp. Sec. 34, p. 53.

Where an amended ordinance was materially different from the original ordinance and the former was never published as required, the annexation was void ab initio. River Oaks vs. North Worth Village, (Tex. Civ. App.) 231 S.W.2d 768.

Any annexation proceeding initiated under T.C.A. Sec. 6-309 or Sec. 6-311 may be abandoned and discontinued at any time by resolution of the governing body of the municipality T.C.A. Sec. 6-313.

In this case, the City enacted no ordinances covering the attempted annexation in 1971. The provisions of the 1968 ordinances put in issue by the quo warranto suits of 1968 were never acted upon. No ruling was ever made concerning whether the ordinances were reasonable or unreasonable. On the contrary, these ordinances were replaced. The pro-

visions of the Circuit Court orders covering the attempted 1971 annexation could not be contested by quo warranto by the aggrieved land owners. There was no way an aggrieved land owner, not a party to the pending quo warranto suits, could have invoked the provisions of T.C.A. Sec. 6-310. Neither T.C.A. Sec. 6-310 nor any other Tennessee statute provides for the filing of a quo warranto where there is no ordinance.

The only documents containing provisions that would normally be found in ordinances are the Circuit Court "final orders" (the compromise consent decrees) entered August 18, 1971. (Tr. Vol. 1, Exs. 5, 6 and 7.) These orders did not validate the 1968 ordinances. Contrary to the 1968 ordinances, the orders provided for a new and different method of annexation, a new and different plan of services and a new and different timetable for putting the new and different services into effect. These provisions were never made the subject of ordinances.

The City never performed its legislative function. It never gave notice nor conducted public hearings nor followed any of the other procedures such as submission to the Planning Commission for study and written reports that would have been necessary to satisfy the requirements of T.C.A. Sec. 6-309.

The Circuit Court orders made no mention whatsoever of the 1968 ordinances. In fact, the orders provided for a contrary course of action (a new method of annexation) as designated by the Tennessee Supreme Court in the case of Frost vs. City of Chattanooga, (1972) 488 S.W.2d 370. In Frost, the Tennessee Supreme Court stated as follows:

> "Chapter 420 grants a municipality the power. . . to annex. . . any territory without levying any municipality ad valorem taxes except for actual municipal services rendered. . . ."

The Circuit Court orders and the 1968 ordinances are incompatible. Petitioners contend that it makes no difference whether the 1968 ordinances be regarded as "abandoned" or "repealed" or as Commis-

sioner Steve Conrad testified "cast aside." (Tr. Vol. 2, p. 168.) The crucial point is that the 1968 ordinances were effectively superseded by the Circuit Court "final orders."

Petitioners contend that the ordinances were repealed under the authority of T.C.A. Sec. 6-313 when the Board of Commissioners resolved by a three to two vote to adopt a new method of annexation, a new plan of services and a new time table in the proposed Circuit Court final orders, all inconsistent with and contrary to the provisions of the 1968 ordinances.

In Tennessee, the municipal body is vested with the legislative discretion to annex additional territories. The courts of Tennessee determine what are the corporate limits already established and determine by inquiry whether or not these boundaries as attempted to be established by the municipal powers comply with the law. The courts of Tennessee have no authority to act for the municipal body in its legislative capacity. City of Johnson City vs. Maden,

(1957) 202 Tenn. 307, 304 S.W.2d 317.

Petitioners contend that it is apparent that the attempted annexation of the areas in question was void ab initio - a nullity and without legal effect. As a matter of law, respondent has no inherent power to annex. This power must come from the state by statute. The statute relied upon by respondent for its power to annex in this case is T.C.A. Sec. 6-309. The City's power must come from the state by statute. A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than as provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature and when so conferred must be exercised in strict accord with the statute conferring it. 56 Am. Jur. 2d, Sec. 63, p. 117.

CONCLUSION

It is submitted that petitioners' basic constitu-

tional rights were violated in this cause. It is obvious that annexation occurred by an illegal and unconstitutional manner, that is by judicial legislation, rather than by legislative action as required by the Tennessee statutes.

The sacred and fundamental concept of separation of powers has been violated by the attempt to annex the areas in question by court decrees. It makes no difference how the decrees be described, whether "consent," "compromise" or otherwise. Likewise, it makes no difference whether the residents in the quo warranto suits may have consented to the entry of the decrees. However it be termed, and whichever way it be viewed, there is only one proper legal conclusion - ANNEXATION BY JUDICIAL LEGISLATION is a void proceeding in violation of property owner's constitutional rights.

For the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to review the opinion

of the Court of Appeals of Tennessee, Eastern Section.

Respectfully submitted.

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Attorneys for Petitioners

APPENDIX.

TENNESSEE CODE ANNOTATED STATUTES:

"Sec. 6-303. Special census after annexation.- In the event any area is annexed to any municipality, the municipality may have a special census within the annexed area taken by the federal bureau of the census or in a manner directed by and satisfactory to the Tennessee state planning commission, in which case the population of such municipality shall be changed and revised so as to include the population of the annexed area as shown by such supplemental census; the population of such municipality as so changed and revised shall be its population for the purpose of computing such municipalities' share of all funds and moneys distributed by the state of Tennessee among the municipalities of the state on a population basis, and the population of such municipality as so revised shall be used in computing the aggregate population of all municipalities of the state, effective on the first day of the next July following the certification of such supplemental census results to the commissioner of

finance and administration of the state of Tennessee."

"Sec. 6-309. Annexation by ordinance.-A municipality when petitioned by a majority of the residents and property owners of the affected territory, or upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole, provided said ordinance shall not become operative until thirty (30) days after final passage thereof.

Provided, however, that before any territory more than one-fourth (¼) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of

the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report, to be rendered within ninety (90) days after such submission, unless by resolution of the governins body a longer period is allowed.

Anything contained in chapter 3 of title 6 to the contrary notwithstanding, a municipality in any county having a population of over sixty-six thousand (66,000) (except in those counties having a population of more than seven hundred thousand (700,000) according to the United States census of population of 1970 or any subsequent federal census; or in those counties which have the metropolitan form of government) shall have the supplemental right and authority to annex upon its own initiative by ordinance any territory without

levying any municipal ad valorem taxes except for actual municipal services rendered, and that the residents of, and persons owning property in, annexed territory shall be entitled to rights and privileges of citizenship, in accordance with the provisions of the annexing municipality's charter, immediately upon annexation as though such annexed territory had always been a part of the annexing municipality; and it shall be the duty of the governing body to put into effect with respect to an annexed area any charter provisions relating to representation on the governing body. Any municipality that exercises such right to annex is hereby authorized, required and shall levy separate ad valorem taxes for each municipal purpose and/or service within the existing limits of the city and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal service or purpose for which such taxes have been imposed is actually being rendered; provided however, that in the case of sanitary sewers, such sewers shall be furnished

within thirty-six (36) months after ad valorem taxes become due.

In counties having a population of more than seven hundred thousand (700,000), or having a population of not less than two hundred and sixty thousand (260,000) nor more than two hundred and eighty thousand (280,000) according to the United States census of population of 1970 or any subsequent federal census, or in those counties which have the metropolitan form of government, a smaller municipality may, by ordinance, extend its corporate limits by annexation of any contiguous territory, when such territory within the corporate limits of a larger municipality is less than seventy-five (75) acres in area, is not populated, is separated from the larger municipality by a limited access express highway, its access ramps or service roads, and is not the site of industrial plant development. The provisions of this chapter relative to the adoption of a plan of service and the submission of same to a local planning commission, if there be such,

shall not be required of the smaller municipality for such annexation."

"Sec. 6-310. Quo warranto to contest annexation ordinance.-Any aggrieved owner of property lying within territory which is the subject of an exation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with Secs. 6-308-6-320 and chapter 28 of title 23, to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole and so constitutes an exercise of power not conferred by law.

If more than one (1) suit is filed, all of them shall be consolidated and tried as one (1) in the first court of appropriate jurisdiction in which suit is filed. Suit or suits shall be tried on an issue to be made up there, and the question shall be whether the proposed annexation be or be not unreasonable in considera-

tion of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. Should the court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom.

If on appeal judgment shall be against the validity of such ordinance, an order shall be entered vacating the same; otherwise, it shall become operative forthwith by court order and shall not be subject to contest or attach in legal or equitable proceeding for any cause or reason, the judgment of the appellate court being final.

Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the muni-

pality shall have the burden of proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the necessity for, or use of municipal services by the industrial plant or plants, and the present ability and intent of the municipality to benefit the said industrial plant development by rendering municipal services thereto when and as needed. The policy and purpose of this provision is to prevent annexation of industrial plants for the sole purpose of increasing municipal revenue, without the ability and intent to benefit the area annexed by rendering municipal services, when and as needed, and when such services are not used or required by the industrial plants.

During the time that any annexation ordinance being contested as provided herein, the annexing municipality and the county governing body (and/or any affected school, sanitary or utility district) may enter into an agreement to provide for new, expanded, and/

or upgraded services and facilities (including, but not limited to, equipment, land, and buildings), and capital expenditures (including sale of bonds) to finance such services and facilities, which agreement shall include an equitable division of the cost and liabilities of such capital expenditures between the annexing municipality and the county governing body (and/or affected school, sanitary, or utility district) upon final determination of such contested annexation ordinance."

"Sec. 6-311. Annexation by referendum--Notice.- A municipality, when petitioned by interested persons or upon its own initiative, by resolution, may propose extension of its corporate limits by the annexation of territory adjoining to its existing boundaries. Such resolution, describing the territory proposed for annexation, shall be published by posting copies of it in at least three (3) public places in the territory proposed for annexation and in a like number of public places in the municipality proposing such

annexation, and by publishing notice of such resolution at or about the same time, in a newspaper of general circulation, if there be one, in such territory and municipality."

"Sec. 6-313. Abandonment of proceedings.- Any annexation proceeding initiated under Sec. 6-309 or Sec. 6-311 may be abandoned and discontinued at any time by resolution of the governing body of the municipality."

"Sec. 16-112. Rules of practice and procedure--Power of Supreme Court.-The Supreme Court of Tennessee shall have the poer to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of this state in all civil suits, actions and proceedings."

"Sec. 27-819. Review of Court of Appeals by Supreme Court.-The Supreme Court, or any judge thereof, shall have the right to require, by certiorari, the removal to that court for review of any case that

has been finally determined in the Court of Appeals, upon a sworn petition for this purpose filed in the Supreme Court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the Supreme Court may prescribe; and there shall be no other method of review."

TENNESSEE SUPREME COURT RULES:

PETITIONS FOR CERTIORARI TO REVIEW JUDGMENTS AND DECREES OF THE COURT OF APPEALS.

"Rule 11. Petitions for certiorari, or certiorari and supersedeas, to remove cases from the Court of Appeals to this court for review of the judgments and decrees of that court, must be filed with the clerk of this court for the proper division thereof, within forty-five days from the entry of the final judgment or decree of the Court of Appeals, unless the time is extended by order of the court or a judge thereof, as authorized by the statute; five days' notice of the filing of the peition being first given opposite counsel, provided the Clerks of the respective divisions of the Court of Appeals shall date the decrees and judgments when filed, and the time for filing petitions for certiorari and for supersedeas shall be computed from said date. The reply brief must be filed in fifteen days after the filing of the petition, provided an extension of time may be granted in proper cases, upon appli-

cation to the court, or a judge thereof."

"Rule 32. Rehearing.-Petitions for rehearing, before being presented to the court, will be furnished to the opposite counsel; and after both sides have prepared briefs, the record, together with the petition and briefs, will be presented to the court without argument. If the court determines that the cause shall be reheard, the change of opinion will be announced, or the counsel will be notified, and the point or points on which reargument is desired will be indicated, and the time for reargument designated. But petitions for rehearing must, in all cases, be presented to the court within ten days after the opinion in the case sought to be reexamined is announced, except decisions made within the last ten days of the term, and in such cases, the petition must be presented as soon after the decision is made as practicalbe, and prior to adjournment of the term. No petition will be received on the last day of the term, other than in cases then decided.

A rehearing will be refused where no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked. (76 Tenn. 736; 79 Tenn. 7; Louisville & N.R.R. Co. v. United States Fidelity & Guaranty Co., 125 Tenn. 658, 691-693, 148 S.W. 671).

No second petition for rehearing shall be filed by any of the Clerks of this Court unless application has been made and special leave obtained from the Court, or a Judge thereof.

OPINION OF CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
(FILED APRIL 9, 1973, ROBERT W. SUMMAR, CLERK)

NO. 46376

James D. Lee, et al,

Plaintiffs

vs.

City of Chattanooga, et al,

Defendants

CHANCELLOR'S MEMORANDUM OPINION

This is an action by property owners and inhabitants of certain areas suburban to the City of Chattanooga brought against the City of Chattanooga and its Board of Mayor and Commissioners as a class action seeking restraining orders to prohibit the defendant City from collection of City taxes for the year 1972, and seeking to recover back such City taxes as have already been paid for the year 1972. The complaint also prays for a declaration that the areas in question have not been lawfully annexed to the City of Chatta-

nooga and are not in fact within the boundaries of that City and, in the alternative, if the Court holds that said areas have been properly annexed, then the Court is asked to "de-annex" said territories. The complaint also asks that certain "final orders" entered by the Circuit Court of Hamilton County in previous litigation be held to be void and for other relief. This suit is not a quo warranto action to attack an annexation ordinance as provided by T.C.A. Sec. 6-310. The response of the defendants to the complaint was a motion to dismiss which has been fully argued and to which certain exhibits were filed, including Resolution No. 8037 of the City of Chattanooga, a notice of 1972 City taxes due which was forwarded to one of the plaintiffs by the defendant City, which notice contains on the fact of it the type-written legend, "Notice- payment received subject to constitutionality of Chapter 420 of the Tennessee Public Acts of 1971." The motion to dismiss is quite lengthy and states numerous grounds, all of which have been considered

by the Court in reaching its decision. All that is presently necessary to decide is whether or not the motion to dismiss is to be granted or whether the suit is to proceed to a final hearing.

The sequence of events involved in this litigation is as follows. On November 12, 1968, the City adopted a plan of services for annexation of each of the three areas here involved as required by T.C.A., Sec. 6-309, and submitted the same to the Planning Commission which gave its approval. This plan of services consisted of 5½ pages of detailed and specific plans for the provision of police protection; fire protection; water for domestic, commercial and industrial use; the installation of fire hydrants; the installation of sewers and a complete sewage system and refuse collection; the maintenance and reconstruction of streets in the areas; the takeover and governing of schools within the areas; the installation of inspection services such as building, electrical, plumbing, gas, housing, weights and measures, etc.; the imposing

of planning and zoning regulations of the City of Chattanooga; the installation and maintenance of such a comprehensive street lighting system; the provision for recreational facilities; and finally, the installation of street names. Said plan of services also provided a detailed timetalbe to be followed whereby each of the above enumerated services were to be completed. Said plan of services was set out in Resolution No. 8037 of the City of Chattanooga which was exhibited to the Court at the hearing of the motion to dismiss. Following the approval of said plan of services by the Planning Commission, the City on November 26, 1968 duly adopted annexation ordinances of the areas in question pursuant to the provisions of the Acts of 1955 which authorized annexation by ordinance. Said 1968 ordinances are exhibits to the plaintiff's complaint. These ordinances were immediately met in December 1968 with quo warranto suits filed by aggrieved property owners in the areas to be annexed pursuant to the provisions of T.C.A., Sec. 6-310. Then a strange

thing happened. These suits were allowed to lie dormant from December 1968 until August 1971, a period of almost 3 years' duration. The plaintiffs allege that this was due to a realization of the City that it could not comply with the plan of services which had been approved, but the Court cannot and does not make a determination of the motives of the City in allowing these quo warranto actions to lie dormant for a period of 3 years. However, it is shown that the defendant City procured the enactment of Chapter 420 of the Public Acts of 1971, which purported to amend T.C.A., Sec. 6-309, by permitting the City of Chattanooga alone to annex by ordinance contiguous territories without levying any municipal ad valorum taxes except for actual municipal services rendered, which has been referred to as the "variable tax annexation plan". Following the adoption of Chapter 420 of the 1971 Public Acts, the Board of Commissioners of the defendant City voted 3 to 2 to enter into compromise decrees of the pending quo warranto actions above mentioned

whereby the City would abandon its previously adopted plan of services and proceed to annex the areas in question under the new 1971 Act and would impose taxes only for the services rendered. Having reached this agreement with attorneys for the complainants in said quo warranto actions, so-called "final orders" were entered in each of the quo warranto actions in the Circuit Court of Hamilton County, which stated in part, "...by agreement and stipulation of the parties and with the Court's approval, said annexation shall be implemented as an annexation in accordance with said statutes as amended by Chapter 420 of the Public Acts of 1971." Said final orders thereafter contained the abbreviated plan of services which consisted of slightly more than ½ page and which was then followed by a provision "that under no circumstances shall any tax be levied for any service prior to the year hereinabove specified therefor." Said final orders also provided that "for the reasons stated in the preamble of Chapter 420 of the Public Acts of 1971, which are made

a part hereof by reference, the City of Chattanooga shall levy separate ad valorum taxes for each municipal purpose and/or service within the existing limits of the City, and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal services or purpose for which such taxes have been imposed is actually being rendered. Said orders then provided that in the event "Chapter 420 of the 1971 Public Acts should ever be finally held unconstitutional or for any other reason it is inapplicable, then the annexation shall be governed by and effectuated under statutes in effect at the time ordinance No. _____ was passed, but in no event shall the Relators or those annexed be liable for any taxes which would otherwise have accrued prior to any such final adjudication." The orders then concluded with a statement that the actions were dismissed with prejudice effective as of December 1, 1971, and adjudged the costs against the City of Chattanooga. Each of said orders was entered on August 18, 1971. The City then pro-

ceeded to annex these areas pursuant to said "final orders" and the 3 to 2 vote approving same hereinabove mentioned, until Chapter 420 of the Public Acts of 1971 was held to be unconstitutional by the Supreme Court of this State in Frost v. City of Chattanooga, on December 18, 1972. After said decision of the Supreme Court was handed down, these plaintiffs filed this action on February 26, 1973 asserting that the purported annexation under the 1971 Act was invalid because the statute upon which it was based, being Chapter 420 of the Public Acts of 1971, was unconstitutional, and because no ordinances were ever adopted to carry out said annexation and asserting that the City could not rely upon the original ordinance passed in 1968 under the 1955 Act for the reason that the same had been abandoned by the City and supplanted by the attempted annexation under the 1971 Act, it being the further assertion of the plaintiffs that the City and the plaintiffs in the quo warranto actions filed in the Circuit Court, and the Circuit Court itself, had no

authority to "by agreement and stipulation of the parties and with the Court's approval: compromise and settle the question of annexation under the 1955 Act and the 1968 ordinances since the Legislature has not delegated such power either to the City, the complainants in the Circuit Court actions or the courts.

Counsel for the City agrees that the 1971 Act under which these areas were attempted to be annexed has been held unconstitutional and that, in fact, ordinances as such were never passed to annex these areas pursuant to the 1972 Act. But, in argument, it was asserted that the areas in question nevertheless should be considered to have been annexed under the 1968 ordinances and the 1955 annexation statutes, because of the provision of the "final orders" in the Circuit Court expressly stating that in the event Chapter 420 of the Public Acts of 1971 should be held unconstitutional or for any other reason inapplicable, then the annexation should be governed and effected under statutes in effect at the time the 1968

ordinances were passed. But the plaintiffs' reply to this is that such attempted "either/or" annexation by "agreement and compromise" must be held to be void ab initio because not delegated by the applicable Code sections. The City asserts several defenses which the Court finds are without merit; such as the Court lacks jurisdiction of the subject matter, that the plaintiffs failed to add indespensable parties, that the complaint fails to state a cause of action, because barred by the so-called 30-day limitation statute contained in T.C.A., Sec. 6-309, and by laches and acquiescence, and that the plaintiffs should be held barred by the rule of res judicata due to the fact that in a previous suit by other parties the Circuit Court "final orders" above mentioned were adjudged not to be voided by fraud or mistake. The City claims that the plaintiffs have no standing to seek relief and numerous other claims are made in said motion.

It is the conclusion of this Court that the crucial questions is whether or not the areas affected can be

held to have been annexed by the 1968 ordinances under the 1955 statutes, for clearly the attempted annexation under the 1971 Act is unconstitutional and void.

> "A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it. The legislature may also prescribe and fix the terms and conditions on which such a law may come into operation." 37 Am. Jur. 641, Municipal Corporations, Sec. 24. (Underscoring added.)

> "The annexation of territory to a municipal corporation is a legislative function which may not be delegated to a court or other body." 37 Am. Jur. 641, Municipal Corporations, Sec. 25. (Underscoring added.)

> "The view has been taken that where the act of alteration of the municipal boundary is absolutely void, because not authorized by law nor under color of law, it is subject to attack by anyone, whenever and whereever its validity is questioned." 37 Am. Jur. 650 Municipal Corporations, Sec. 32.

It has been stated that "the jurisdiction to annex

or detach territory or extend or reduce corporate limits is special, and therefore that a substantial compliance with all mandatory requirements of the statute is essential." McQuillin, Municipal Corporations, Volume 2, Section 729.

It is the opinion of the Court that the original plan of annexation as represented by the plan of services and the ordinances enacted in 1968 were clearly abandoned in 1971 when the "final orders" were entered in the Circuit Court quo warranto suits and that the City then proceed to institute a different and much abbreviated plan of services, adopted a new timetable for placing such services into effect and provided a drastically reduced plan of taxation of the inhabitants. The Court is further of the opinion that the City, the complainants in the Circuit Court actions and the Circuit Court itself were without authority to delay the implementation of the 1968 ordinances and plan of services, or to make the same contingent upon the possible determination

in the future that Chapter 420 of the 1971 Public Acts be determined to be unconstitutional. This is so because the applicable general statues have not vested any such power as asserted by the City. Indeed, this Court is of the opinion that a quo warranto action which contests an annexation by ordinance cannot be validly compromised. Our statutes do not provide for any annexation by agreement or by compromise or by court order. Thus, T.C.A., Sec. 6-309, provides that an annexation by ordinance shall become operative 30 days after final passage thereof: and T.C.A., Sec. 6-310, provides that when one or more quo warranto actions are filed to contest annexation by ordinance, the "suit or suits shall be tried" on an issue to be made up there, and the question shall be whether the purported annexation be or be not unreasonable, etc. "Should the Court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall

then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom." (Underscoring added.) One should take note of the number of times "shall" appears in these provisions.

T.C.A., Sec. 6-313, provides that an annexation proceeding by ordinance "may be abandoned and discontinued at anytime by resolution of the governing body of the municipality".

Counsel for the City miss the point when they argue that this holding of the Court is in conflict with the recognized right of protesting property owners to dismiss any quo warranto action which they may bring. Such right of voluntary dismissal is in no way comparable to the case at bar. What was attempted in this case was annexation by compromise consent decrees under an unconstitutional statute. Instead, our statutes expressly set out the particular steps which must be taken if a valid annexation is to be accomplished by ordinance and it is only by following these steps,

at least substantially, that a valid annexation may be accomplished. For authority to the effect that certain litigation may not be compromised by public officials charged with public duties see Hamilton National Bank v. Richardson, 42 Tenn. App. 486, 304 SW2d 504.

The motion to dismiss must be overruled and the restraining orders requested prohibiting the City from making any further collection of 1972 taxes in the effected areas will be issued. However, all other question, including the question whether or not those who have already paid 1972 City taxes are entitled to recover the same, are reserved until a final hearing. The suit is sustained as a class action and will be treated henceforth as such.

April 9, 1973.

/s/ Ray L. Brock, Jr.
CHANCELLOR - Part 1

OPINION OF CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
(FILED MAY 10, 1973, ROBERT M. SUMMAR, CLERK)

NO. 46376

J. D. Lee, et al

vs.

City of Chattanooga, et al

CHANCELLOR'S MEMORANDUM OPINION

This action is one brought to determine whether certain areas have been annexed by the city of Chattanooga and to determine whether the residents of said area are subject to taxation by the city. The Court handed down a memorandum opinion on April 9, 1973, in disposing of a motion to dismiss the complaint, which memorandum opinion the Court hereby in all things reaffirms and incorporates in this opinion by reference. Consequently, the matters dealt within the opinion of April 9 will not be repeated and the remainder of this opinion will deal with questions

discussed in the April 9, 1973 memorandum opinion.

In short, the Court adheres to its opinion that (1) the 1968 ordinances and plan of service for these areas were abandoned, as verified by Commissioner Conrad's testimony. See T.C.A. Sec. 6-313, and (2) that the attempt to annex these areas pursuant to Chapter 420 of the Public Acts of 1971 was ineffective for the reasons that (a) the said Chapter 420 of Public Acts of 1971 was unconstitutional and (b) no ordinances were ever adopted purporting to annex these territories under said Chapter 420, and (c) neither the Circuit Court nor the City by agreement with the residents had power to annex. See: Witt vs. McCanless, 200 Tenn. 360; 292 S.W. 2d 342.

The argument by the city that the "final orders" entered in the quo warranto suits on August 18, 1971 are "severable", that although the provisions of those orders purporting to annex these areas under the 1971 act and providing for a new and much abbreviated plan of services and for a plan of "variable taxation"

may have been beyond the subject matter jurisdiction of the Circuit Court, nevertheless, the clause in said orders providing for the dismissal of the quo warranto actions with prejudice should be recognized as valid and binding upon all residents of the areas in question is completely untentable and inquitable. Lindsay vs. Allen, 112 Tenn 638, 657. It is obvious that the plaintiffs in those quo warranto actions would never have agreed to the dismissal clause in said "final orders" unless said orders also included the provisions for annexation under the 1971 Act especially the provisions for paying taxes only for the services actually rendered by the city to the residents. The provisions of those orders are too inextricably bound together for the dismissal clause to be separable. See: Jones vs. City of Memphis, 101 Tenn 188; 47 S.W. 138.

The city argues that if the annexation of these areas was not de jure it should nevertheless be recognized as de facto. It is true that some cases refuse

to permit attack upon an alleged annexation if the roots of the city have been put down so deep that to pull them out would result in unreasonable inconvenience and harm to the public, and if the residents in the areas concerned have acquiesced in the exercise of jurisdiction over said areas for a long period of time. Thus, the doctrine is one of estoppel or waiver, not de facto. The Court finds that in this case, no such circumstances appear because (a) the city has not invested any substantial amount of permanent improvements such as the placement of sewer lines, water lines, etc. and, in fact, except for using its police force in the areas, and except for minor street maintenance and for providing so-called "general services", all beginning January 1, 1972, the city invested practically no money in these areas. It does appear from the evidence that following the decision of the Supreme Court in Frost vs. City of Chattanooga wherein Chapter 420 of Public Acts of 1971 was held unconstitutional, the city began to make plans for a

more substantial provision of services but Commissioner Conrad testified that there is not even at this date a written plan for services for these areas. It thus appears that to hold that these areas have not been de facto annexed would in no wise work a substantial inconvenience to the public or to the city. And, there is no unreasonable delay for the plaintiffs in this case filed their suit on February 26, 1973 following the decision of the Supreme Court in Frost vs. City of Chattanooga on December 13, 1972. Two city elections have been held in which the residents of these areas voted but the evidence shows that the outcome of both elections would have been the same if the residents of these areas had not voted. Therefore, so-called "de facto" annexation is not shown.

The Court is of the opinion that although the de facto doctrine cannot be used to make annexation effective beyond an adjudication that there was no annexation of these areas, nevertheless, the acts of the city in these areas up to the time of the adjudi-

cation in this case can be upheld as a true de facto situation and, therefore, the levy and payment of 1972 city taxes on the residents of these areas, the building permits issued in these areas and the zoning of the property and the voting in city elections in these areas, all since August 18, 1971 up to the time of a decree in this cause, should be upheld. Kidd vs. McCanless, 200 Tenn. 273; 292 S.W. 2d 40; Rideout vs. State, 161 Tenn. 248, 30 S. W. 2d 255. Accordingly, the restraining order heretofore issued prohibiting the city from collecting the balance of 1972 taxes owed by property owners in these areas will be dissolved. This is equitable because it appears from the evidence that 90% of the taxpayers in these three areas have already paid their 1972 taxes and, further, that by reason of the city's attempted annexation these same taxpayers have paid a lower county tax rate for 1972, and additionally, the residents of these areas did receive "police protection, street maintenance and general services" from January 1, 1972 and garbage

collection from Janaury 1, 1973, plus the erection of street signs at a cost of approximately $12,000.00.

The result is that the Court holds that the areas in question are not annexed to the City of Chattanooga, either de jure or de facto, and that the city will be enjoined from exercising any jurisdiction over said areas from and after the entry of the decree in this cause, except that it may collect the remainder of 1972 city property taxes which have already been assessed.

The claim of the plaintiffs that they are entitled to recover city taxes already paid is denied for the reasons hereinabove stated.

Of course, either or both sides to this actions will be granted an immediate appeal if requested. The solicitors for the plaintiffs shall submit an appropriate decree.

This 10th day of May, 1973.

/s/ Ray L. Brock, Jr.
CHANCELLOR, PART I

OPINION OF TENNESSEE COURT OF
APPEALS, EASTERN SECTION
(FILED JULY 24, 1973, JOHN PARKER)

J. D. Lee, et al

vs.

City of Chattanooga

OPINION

This case involves the question of the effect of three annexation ordinances of the City of Chattanooga passed pursuant to T.C.A. Sec. 6-303, et seq.

The basic and underlying questions are: (1) Can a municipality contract its territorial boundaries otherwise than under the provisions of T.C.A. Sec. 6-304, with particular reference to territory theretofore annexed pursuant to T.C.A. Sec. 6-303, et seq., unchallenged by quo warranto filed within thirty (30) days and prosecuted to final judgment; (2) Can such municipality having finally passed such annexation ordinance "de-annex" such territory by resolution after the lapse of thirty (30) days; (3) Can the

municipality be compelled to repay to taxpayers residing in such annexed territory taxes paid under the assumption said taxes would be based upon the "services" furnished residents of such territory or must they pay taxes at the same rate as other residents of the City?

The Chancellor held the residents of such territory could challenge the annexation ordinance many months after an agreed order had been entered in a quo warranto proceeding, among other things dismissing the quo warranto proceeding, the terms of which order will be adverted to hereinafter. The Chancellor also held the annexation was never carried out but was "abandoned" by the resolution above mentioned. And that "annexation by ordinance cannot be validly compromised." The result of this holding is that such annexed territory was not a part of the municipality of Chattanooga. The Chancellor held, however, that there could be no differentiation in the rate of taxation between such residents or property owners and the legally established tax rate for tax-

payers within the original boundaries of the City and denied them the right to recover taxes paid the City.

Both parties have appealed.

After the case reached this Court, upon motion, certain persons desiring to remain in the City under the annexation ordinances were permitted to file a brief and present oral argument as amicus curiae.

It should be stated at the outset that this is not a quo warranto proceeding. Separate bills were filed by certain residents of three contiguous suburbs of of Chattanooga, East Brainerd, Tyner and Lake Hills-Murray Hills to have a decree holding the annexation proceedings as to each of the areas involved declared void and of no effect and to enjoin the City of Chattanooga and its Board of Commissioners from collecting any municipal taxes within the affected territories. The bill also sought an adjudication holding void and of no effect the above mentioned compromise order in the quo warranto proceeding in the Circuit Court and also holding void a decree entered by Special

Chancellor Finkelstein in a subsequent action holding the territories in question were and had been since the passage of the annexation ordinances a part of the City of Chattanooga.

We reverse the holding of the Chancellor that such territories had been "de-annexed" and affirm the holding that there can be no abatement or recovery of taxes because the City allegedly has not as yet furnished all the services embraced within the plan of annexation, or because the annexation ordinances had been "abandoned", as insisted. If there is a remedy for this dereliction, it is not the abatement of taxes.

It is conceded by complainants that the annexation ordinances were validly passed on November 6, 1968. Within thirty (30) days thereafter quo warranto suits were filed in the Circuit Court challenging the reasonableness of the action of the City in passing the ordinances of annexation. Nothing further appears to have been done except the filing of an answer to the suit attacking the ordinances until August 18, 1971,

when an agreed order was entered by the Circuit Judge by the terms of which, among other things, the "services" to be furnished by the City were to some extent altered. In the meantime the Legislature passed an Act applicable to the City of Chattanooga providing what is referred to in the record as the "variable tax plan" under which the taxpayers of the annexed areas would be taxed only to the extent the contemplated services were actually being rendered by the City. The order then continued:

> "5. That, if Chapter 420 of the Public Acts of 1971 shall ever be declared unconstitutional, or for any other reason it is inapplicable, then the annexation shall be governed by and effectuated under the statutes in effect at the time the ordinances (were) passed, but in no event shall the Realtors or those annexed be liable for any taxes which would otherwise have accrued prior to to any such adjudication."

The order concluded by stating that the suit was dismissed with prejudice effective December 1, 1971. On December 18, 1972, the Supreme Court did hold Chapter 420, Acts of 1971 unconstitutional,

a possiblity envisioned by the agreed order of August 18, 1971, _____ Tenn. _____, 488 S.W. 2d 370. This suit was filed February 26, 1972.

Sharply debated in the briefs and in oral argument is the question whether the City ever passed a resolution compromising the original quo warranto proceeding. Complainants insist such a resolution was passed in legal form while the City insists nothing was done except that the Commissioners met informally in the office of the City Attorney and authorized him by a vote of 3 to 2 to sign the agreed order above mentioned. In the view we take we find it unnecessary to decide that issue for we are of the opinion that once the annexation ordinances were validly passed, as concededly they were, and there was never any adjudication by the courts that they were not validly passed the annexed territories became a part of the City of Chattanooga and could not be severed from it by any resolution passed by the governing body of the City.

Counsel for complainants strongly rely upon

T.C.A. Sec. 6-313, providing:

> "Abandonment of Proceedings. Any annexation proceeding initiated under Sec. 6-309 or 6-311 (this propeeding was initiated under 6-309) may be abandoned and discontinued at any time by resolution of the governing body of the municipality. (Acts of 1955, Chapter 113, Sec. 4.)"

Counsel thus seeks to equate "initiated" with "passage" of an ordinance passed after the hearing required or election held as required by T.C.A. Sec. 6-311 and T.C.A. Sec. 6-312, respectively. We canoot agree. On the contrary we think the purpose of the Legislature was to confer upon the governing body of the municipality the right to order an election by referendum, T.C.A. Sec. 6-312, or hold a public hearing under T.C.A. Sec. 6-311 upon its own initiative after publication describing boundary to be annexed and, having done either, decide to proceed no further with the annexation. To initiate either method is a far cry from formally passing an ordinance incorporating the affected area. To mention

only one reason for abandoning the annexation, the municipal board might decide there was too much opposition to the proposal to make the annexation feasable or desirable. Other reasons could be imagined.

We are fortified in this conclusion by Chapter 10, now codified as T.C.A. Sec. 6-304, of the same Act providing:

> "Contraction of limits. Any incorporated city or town, whether same shall have been incorporated by general or special act, may contract its limits within any given territory, provided three-fourths of the qualified voters voting in an election thereon assent thereto."

Construing these two Sections pari materia and as parts of the scheme devised by the Legislature for expanding and contracting the boundaries of municipalities we are driven to the conclusion that "initiated" cannot be given the same meaning as a completed and valid "passage" of an incorporation ordinance.

It results that the assignments of the City of Chattanooga must be sustained and we turn to the question of restitution by the City of taxes paid in the

interim between the passage of the annexation ordinances and the decision of the Supreme Court holding the 1971 Act unconsitional.

Since the 1971 Act was held unconstitutional and we have held that, even if passed, a resolution of the governing body of the City attempting to "de-annex" territories already validly annexed would be nugatory and void it follows that the annexed territories were as much a part of the City of Chattanooga as the pre-existing portion of the City and that the people living within the annexed territories would necessarily be compelled to pay the same taxes as the people living within the original boundaries. This seems to have been recognized by the parties; otherwise, the 1971 Act would never had been conceived of or enacted.

It results that, unless estopped by the act of the City Treasurer in mailing notices stating the tax was to be subject to the provisions of the Act of 1971 the people living in the annexed territories cannot be

relieved of paying the same taxes as other residents of the City. We are not persuaded that this action can have the asserted effect. As we have held these outlying residents were subject to the same tax burden as residents living within the old boundaries of the City. They were, therefore, not prejudiced by this action or by the terms of the agreed order purporting to relieve them of taxes until the determination of the constitutionality of the 1971 Act, and cannot complain, the time for filing quo warranto, as we understand the record, having already expired.

It is well settled that, absent some loss or injury, estoppel cannot be applied. Osborne v. Baker, 35 Tenn. App. 300, 245 S.W. 2d 419. Numerous cases could be cited for the rule.

And, generally, the doctrine of estoppel does not apply to acts of public agents. State v. Williams, 207 Tenn. 695, 343 S.W. 2d 857.

The action of the Chancellor in holding residents and taxpayers of the annexed territories not

entitled to recover taxes paid is, accordingly, affirmed though we base this holding upon a different ground.

Costs of appeal will be taxed to complainants and sureties on their appeal bond. Costs below will remain as taxed.

Except as modified the decree of the Chancellor is affirmed.

/s/ McAmis
Retired P.J. Court of
Appeals, Special Judge

CONCUR:

/s/ James L. Parrott
/s/ Clifford E. Sanders

(FILED JULY 25, 1973, JOHN A. PARKER)

J. D. Lee et al

versus

City of Chattanooga et al

In this cause, in accordance with the opinion heretofore filed and by reference made a part hereof, it is ordered, adjudged and decreed that there is no merit in the appeals of Complainants J. D. Lee et al. The assignments filed by J. D. Lee et al are accordingly overruled, and the decree affirmed in so far as it empowered the City of Chattanooga to collect taxes within the annexed territories.

And it further appearing that there is manifest error in the decree of the Chancellor holding void and unenforceable the three annexation ordinances described in the pleadings and referred to in the opinion it is further ordered, adjudged and decreed that said ordinances are valid and that said territories are and have been since the enactment of said ordinances a part of the City of Chattanooga. Accordingly, the

assignments of the City of Chattanooga are sustained, the motion of the City of Chattanooga to dissolve the injunction is sustained and the injunction in all respects vacated and for nothing held.

Costs of the cause, including cost of appeal are adjudged against complainants and sureties on their appeal bonds.

Enter this July 26, 1973 Nunc Pro Tunc for July 24, 1973.

/s/ James W. Parrott
Judge

Judge

/s/ McAmis
Sp. Judge

Office of
Clerk of Supreme Court
State of Tennessee

P. O. Box 444
Knoxville, Tenn. 37901
Tel. 525-5171

Nov. 5, 1973

Dear Sir:

In the cause of James D. Lee, et al vs. City of Chattanooga, et al the Supreme Court today

the judgment of the Lower Court
WRIT DENIED

Yours truly,

JOHN A. PARKER, Clerk

Office of
Clerk of Supreme Court
State of Tennessee

P. O. Box 444
Knoxville, Tenn. 37901
Tel. 525-5171

Jan. 7, 1974

Dear Sir:

In the cause of James D. Lee, et al vs. City of Chattanooga, et al the Supreme Court today

the judgment of the Lower Court
Petition to Rehear Denied

Yours truly,

JOHN A. PARKER, Clerk

IN THE SUPREME COURT OF TENNESSEE
EASTERN SECTION
No. 248

James D. Lee, et al,

Petitioners

vs

The City of Chattanooga, et al

Respondents.

ORDER

On application of Appellants, it is hereby

ORDERED that Appellants be and they hereby are permitted to file a second petition for rehearing of their petition for certiorari which has previously been denied by this court and the time within which said petition may be filed is hereby extended to and including January 31, 1974.

Dated January 17, 1974.

/s/ Chester Chattin
JUDGE

APPROVED:

TANNER & JAHN, ATTORNEYS
Twelfth Floor Volunteer Building
Chattanooga, Tennessee 37402

By /s/ Stan Guthrie
Attorneys for Petitioners

Office of
Clerk of Supreme Court
State of Tennessee

P. O. Box 444
Knoxville, Tenn. 37901
Tel. 525-5171

May 6, 1974

Dear Sir:

In the cause of James D. Lee, et al vs. City of Chattanooga, et al the Supreme Court today

the judgment of the Lower Court
Second Petition to Rehear Denied

Yours truly,

JOHN A. PARKER, Clerk